No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Should *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), be overruled and public-sector agency-fee arrangements declared unconstitutional under the First Amendment?

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BRIEF OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The American Federation of Government Employees (AFGE) is a national labor organization and affiliate of the AFL-CIO.[1] AFGE is the largest federal employee

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus* or its counsel made such a contribution. All parties have

union in the country. In conjunction with affiliated councils and local unions, it represents 700,000 civilian employees in agencies and departments across the federal and District of Columbia governments. AFGE's representation of those employees includes collective bargaining as well as direct representation in unfair labor practice proceedings and grievance arbitrations under the Federal Service Labor-Management Relations Statute. It also includes representation of federal employees in litigation before the U.S. Merit Systems Protection Board, the U.S. Equal Employment Opportunity Commission, and federal courts across the United States.

The question in this case concerns the government's ability, consistent with the First Amendment, to require public employees to pay fair-share union fees to compensate the union for activities undertaken for the benefit of non-members. Fair-share fees are designed to address a collective-action problem. The law requires a union to fairly represent the interests of members and non-members alike. Public employees thus can avoid the financial costs of being dues-paying members of the union, because their interests will be represented even if they do not contribute financially to union efforts that benefit them. Fair-share fee requirements ensure that a union receives adequate funding commensurate with the full scope of services that the law requires the union to provide.

AFGE knows first-hand the difficulties a public-sector union faces when it cannot collect a fair-share fee and, as a result, free-riders proliferate. Most of the 700,000 public-sector employees that AFGE represents are

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consented to the filing of this brief. Copies of letters granting consent have been filed with the Clerk.

federal workers. Federal law, however, prohibits unions from collecting fair-share fees. See 5 U.S.C. §7102. As a result, many of the employees AFGE represents do not contribute toward the cost of their representation, despite reaping its benefits. AFGE has a strong interest in ensuring that the current federal statutory bar on collection of fair-share fees not be enshrined as a matter of constitutional law.

At the same time, AFGE recognizes the societal benefits of public-employee speech. It frequently advocates for the First Amendment rights of the employees it represents and has sought to protect public employees' free-speech rights in the courts. See, *e.g.*, *U.S. Dep't of Justice* v. *Fed. Labor Relations Auth.*, 955 F.2d 998 (5th Cir. 1992); *Am. Fed'n of Gov't Emps., Local 2031* v. *Fed. Labor Relations Auth.*, 878 F.2d 460 (D.C. Cir. 1989). AFGE therefore has a unique, and uniquely balanced, perspective on the issue presented.

SUMMARY OF ARGUMENT

In *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), this Court held that, consistent with the First Amendment, the government may require its employees to pay fair-share fees to unions to cover the costs of collective bargaining. *Abood*'s countenancing of fair-share fees reflects the government's wide latitude to manage its workforce and finds strong footing in the original understanding of the First Amendment.

I. The government has long been permitted to undertake certain actions that put some burden on speech, if those actions are in service of the government's role as an employer. Any originalist examining the issue would quickly recognize political patronage—the practice of appointing one's political supporters to public office—as a stark example of the government's freedom to act in its

role as employer. Patronage was widely practiced and widely endorsed by the Framers as a means of making early governments work. To the first Federalists, it would have been impossible to form a functioning government comprised of employees with diametrically different views about what government should be. Up to and including Lincoln, every administration that took power from an opposition party used patronage to select employees who would support, rather than hinder, their missions. If, consistent with the original understanding of the First Amendment, the government could condition employment on political views, surely it can impose fees that are necessary for collective bargaining to function, even if it has ancillary effects on employee speech.

II. In the last 50 years, this Court has departed from that originalist viewpoint and accorded public employees more robust First Amendment rights. But that departure has to have limits, and it would be an unwarranted extension of those precedents to overrule *Abood*. This Court has repeatedly recognized that, while government employees certainly have free-speech rights, the government has a strong interest in regulating its relationship to its employees and ensuring it has an effective organization with which it can negotiate. As *Abood* previously recognized, the fees at issue here, which facilitate bargaining with a group of government employees, serve precisely that compelling purpose. This Court should not extend more recent decisions like *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62 (1990), and *Branti* v. *Finkel*, 445 U.S. 507 (1980), to the point where these values, as reflected in *Abood*, are defeated.

ARGUMENT

In *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), this Court held that the First Amendment does

not prohibit the government from requiring its employees to pay agency fees to unions to cover the costs of collective bargaining, contract administration, and grievance adjustment. Although public unions are largely a 20th century innovation, *Abood*'s approval of required agency fees finds strong footing in the original understanding of the First Amendment.

The Framing generation, for example, regularly engaged in political patronage—hiring based on political affiliation—making public employment a function of core First Amendment conduct. Historically, there was no thought that those practices could be unconstitutional.

This Court's precedent has since departed from those practices, recognizing greater First Amendment rights for government employees. But the departure from originalist perspective must have a stopping point. *Abood* reflects that stopping point. The government has a powerful interest in dealing with one union, selected by its employees. To that end, the government may require all those who benefit from the efforts of that representation to make a fair economic contribution to those efforts. "[W]here the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost." *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part).

Precedent departing from the originalist approach should not be extended so far as to impede the collection of fees necessary to serve the compelling interest in allowing the government to deal with an organized and informed employee representative. The imposition of such fees involves only the most minimal burden on free-speech rights. Unlike patronage, for example, it neither punishes petitioner for his political views nor rewards

others for their different political views. It neither compels petitioner to speak, nor silences him from expressing any view on any subject. It nowhere approaches the invasion of First Amendment rights that patronage—hiring based on political views—encompassed.

I. *ABOOD* IS CONSISTENT WITH HISTORICAL UNDERSTANDINGS OF THE FIRST AMENDMENT

In *Abood*, this Court held that the First Amendment permits the government to compel employees to pay "service charges [that] are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." 431 U.S. at 232. The Court observed that any burden on employees' First Amendment rights in this context "is constitutionally justified by the * * * important contribution of the union shop" to the government's function as an employer. *Id.* at 222, 224 (noting the "confusion and conflict that could arise if rival" unions sought to separately negotiate with the government).

Abood fits comfortably into historical practice and the original understanding of the First Amendment. For "many years 'the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights.'" *Garcetti* v. *Ceballos*, 547 U.S. 410, 417 (2006) (quoting *Connick* v. *Myers*, 461 U.S. 138, 143 (1983)). "That dogma has been qualified" over time—and properly so. *Ibid.* The question in this case is whether to further extend that qualification—and extend First Amendment rights—so far as to invade the government's interest in dealing with a single, qualified representative over employment-related matters. The answer is "no."

For the first two-thirds of this Nation's history, it was routine for the government to condition employment on

requirements that strike at the core of the First Amendment. For example, the Framers and subsequent generations would use a citizen's political affiliation and political expression as a basis for employment decisions. Neither the courts nor Congress constrained that practice. Simply put, excluding, hiring, or removing public employees and government contractors because of their political beliefs was once "an American political tradition as old as the Republic." *Bd. of Cty. Comm'rs* v. *Umbehr*, 518 U.S. 668, 688 (1996) (Scalia, J., dissenting). From George Washington onward, early state and federal administrations imposed political tests for public employment and discriminated on the basis of ideology in the name of effective governance. See *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 96 (1990) (Scalia, J., dissenting). Historically, there was never "any thought that [patronage] could be unconstitutional." *Ibid.* Patronage "had been sanctioned by history," *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712, 717 (1996), and the First Amendment did not stand in its way.

A. Early Presidential Administrations

1. George Washington depended on political patronage for his government to function—populating government positions with Federalists and those who had supported the Constitution. As Washington told his Secretary of War, "I shall not, whilst I have the honor to administer the government, bring a man into any office of consequence knowingly, whose political tenets are adverse to the measures, which the general government are pursuing." Letter from George Washington to Timothy Pickering (Sept. 27, 1795), *in* 13 *The Writings of George Washington* 106, 107 (Worthington Chauncey Ford ed., 1892). Doing so, Washington explained, "would be a sort of political suicide." *Ibid.* True to his word, Washington

adhered to a "policy of excluding most [antifederalists]." Carl Russell Fish, *The Civil Service and the Patronage* 19 (1905); see also *Elrod* v. *Burns*, 427 U.S. 347, 378 (1976) (Powell, J., dissenting); Carl E. Prince, *The Federalists and the Origins of the U.S. Civil Service* 2, 4 (1977); David H. Rosenbloom, *Federal Service and the Constitution* 33-34 (2d ed. 2014).

For Washington, the government could not function effectively unless those carrying out the government's work supported the new constitutional system. See Fish, *supra*, at 9; Prince, *supra*, at 2. Antifederalists could not run the very offices that they had recently opposed. Washington thus considered an individual's political beliefs a key component of his fitness-for-office test. See Fish, *supra*, at 9 ("[P]olitical orthodoxy was considered as one of the elements of fitness for office."); see also Letter from George Washington to Charles Carroll (May 1, 1796), *in* 35 *The Writings of George Washington* 29, 29 (John C. Fitzpatrick ed., 1940) (noting Washington's preference to make appointments based on "fitness for the Office").

Those in Washington's inner circle espoused similar views. James McHenry, Washington's former aide-de-camp, among other Federalists, "urged a political test on Washington." Prince, *supra*, at 3. Alexander Hamilton once intervened to prevent the reappointment of antifederalist revenue officers in Rhode Island, who were described to him in a letter as "*Bitter* and *Uniform* opposers of the Constitution." *Id.* at 7 (quoting Letter from Jeremiah Olney to Alexander Hamilton (June 7, 1790), *in* 6 *The Papers of Alexander Hamilton* 458-459 (Harold C. Syrett ed., 1962)).

2. John Adams's "personnel practices [as president] were similar to Washington's but were more politically

oriented," Rosenbloom, *supra*, at 34; see also *Elrod*, 427 U.S. at 378 (Powell, J., dissenting), and "more openly partisan," Prince, *supra*, at 10; see also Cynthia Grant Bowman, *"We Don't Want Anybody Anybody Sent": The Death of Patronage Hiring in Chicago*, 86 Nw. U. L. Rev. 57, 60 (1991) (noting that when Thomas Jefferson replaced Adams as president, Federalists dominated federal employment). Describing his hiring approach in an October 4, 1800 letter to his treasury secretary, Adams wrote: "Washington appointed a multitude of democrats and jacobins of the deepest die. I have been more cautious in this respect." Letter from John Adams to Oliver Wolcott, Jr. (Oct. 4, 1800), *in* 9 *The Works of John Adams* 87, 87 (Charles Francis Adams ed., 1854). "Political principles and discretion will always be considered, with all other qualifications, and well weighed, in all appointments," he said. *Ibid.*

Adams's consideration of ideology was not confined to hiring decisions; he was the first president to remove an official because of political affiliation. Rosenbloom, *supra*, at 34. For example, Adams removed customs officers because of their supposed "aversion, if not hostility to the national Constitution and government." Letter from John Adams to Benjamin Lincoln (Mar. 10, 1800), *in* 9 *The Works of John Adams*, *supra*, at 46, 47; see Prince, *supra*, at 11.

3. Politically motivated decision-making in public employment continued under Thomas Jefferson. See *Elrod*, 427 U.S. at 353 (plurality opinion); see also *Branti* v. *Finkel*, 445 U.S. 507, 522 n.1 (1980) (Powell, J., dissenting). Jefferson's election brought the Nation its first transfer of executive power from one political party to its rival. Following his inauguration, Jefferson "found nearly all the offices filled by his opponents," Fish, *supra*, at

29, and moved to construct a federal public service more amenable to carrying out his agenda, see *Elrod*, 427 U.S. at 378 (Powell, J., dissenting) ("Jefferson, the first President to succeed a President of an opposing party, made significant patronage use of the appointment and removal powers."); see also Martin Tolchin & Susan Tolchin, *To the Victor* 323 (1971).

In an August 1801 letter to Attorney General Levi Lincoln, Jefferson wrote of his forthcoming reconfiguration of the civil service:

> I had foreseen, years ago, that the first republican President who should come into office after all the places in the government had become exclusively occupied by federalists, would have a dreadful operation to perform. That the republicans would consent to a continuation of every thing in federal hands, was not to be expected * * *. On him then was to devolve the office of an executioner, that of lopping off.

Letter from Thomas Jefferson to Levi Lincoln (Aug. 26, 1801), *in* 3 *Memoirs, Correspondence, and Private Papers of Thomas Jefferson* 484, 484-485 (Thomas Jefferson Randolph ed., 1829). Jefferson dutifully performed that operation, "proceeding gradually in the regeneration of offices, and introducing republicans to some share in them." Letter from Thomas Jefferson to Levi Lincoln (July 11, 1801), *in* 3 *Memoirs, Correspondence, and Private Papers of Thomas Jefferson*, *supra*, at 478.

4. Presidents James Madison, James Monroe, and John Quincy Adams all were members of the same political party as their predecessor, limiting the occasion for "conspicuous patronage practice in employment." *Elrod*, 427 U.S. at 378 (Powell, J., dissenting); see also

Rosenbloom, *supra*, at 36. But the next administration—that of Andrew Jackson—brought political patronage to a new level.

Having become "the first President since Jefferson to succeed an antagonistic administration," Jackson "used patronage extensively." *Elrod*, 427 U.S. at 378 (Powell, J., dissenting); see also Bowman, *supra*, at 60; Megan Glasheen, *Patronage Employment Practices and the First Amendment*, 34 How. L.J. 663, 664-665 (1991). During his tenure, Jackson removed about twenty percent of all federal employees. See Gerald E. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. Pa. L. Rev. 942, 951-952 (1976). That ushered in the spoils-system era, during which political activity and affiliation gained primary importance in public employment. See Office of Pub. Affairs, U.S. Civil Serv. Comm'n, *Biography of an Ideal* 17 (1974); Rosenbloom, *supra*, at 43-54.

Like his predecessors, Jackson saw patronage as a means to a properly functioning government. In his view, patronage increased rotation in office, opening the public service beyond an elite segment of the population and ensuring bureaucratic accountability and responsiveness. Andrew Jackson, First Annual Message to Congress (Dec. 8, 1829), *in The Addresses and Messages of the Presidents of the United States, Together with the Declaration of Independence and Constitution of the United States* 339, 344 (McLean & Taylor 1839); Rosenbloom, *supra*, at 43-45; Frug, *supra*, at 951-952; Developments in the Law—Public Employment, 97 Harv. L. Rev. 1611, 1624 (1984).

5. Like his predecessors, Abraham Lincoln too used patronage. And like his predecessors, he viewed its use as critical to effective governance—indeed, to prevent the

government from splintering apart. Frug, *supra*, at 952; Tolchin, *supra*, at 326; see generally Harry J. Carman & Reinhard H. Luthin, *Lincoln and the Patronage* (1943). "President Lincoln's patronage practices and his reliance upon the newly formed Republican Party enabled him to build support for his national policies during the Civil War." *Branti*, 445 U.S. at 522 n.1 (Powell, J., dissenting). "Lincoln realized that public jobs wisely distributed were the cement he must use to hold the Republican party together." Carman & Luthin, *supra*, at 10.

B. Early Congresses

As president after president filled administration positions on the basis of political ideology, Congress did not merely acquiesce. See *Elrod*, 427 U.S. at 354 (plurality opinion); *Kato* v. *Ishihara*, 360 F.3d 106, 113 (2d Cir. 2004); Frug, *supra*, at 952-954. Instead, Congress enhanced the president's ability to reward loyal partisans with federal employment, enacting the Tenure of Office Act of 1820, ch. 102, 3 Stat. 582. That statute provided that certain public employees—including district attorneys, collectors of customs, and receivers of public moneys for lands—be appointed for four-year terms, allowing the president to reshape the civil service without necessarily resorting to the removal power. § 1, 3 Stat. at 582; see Rosenbloom, *supra*, at 36; Office of Pub. Affairs, U.S. Civil Serv. Comm'n, *supra*, at 12. It was not until the mid-19th century that Congress moved to alter such practices.

C. State Practices

From the Republic's early years, state practice paralleled that of the new federal government. See *Elrod*, 427 U.S. at 378 (Powell, J., dissenting). For example, when Jefferson assumed the presidency, he noted that the Federalists who controlled the Connecticut legisla-

ture harbored an "intolerance" to hiring Republicans. Letter from Thomas Jefferson to Levi Lincoln (July 11, 1801), *supra*, at 479; see also Jeremy D. Bailey, *Thomas Jefferson and Executive Power* 161-162 (2007). But one could easily have made a similar observation about New York. It "was the first state in which the offices were openly and continuously used for partisan purposes." Fish, *supra*, at 86. When John Jay became governor in 1795, his "[a]ppointments were * * * confined to Federalists." Fish, *supra*, at 89-91. Later, after an 1801 constitutional convention, a council of appointment with authority over state patronage facilitated the growth of the spoils system in New York. *Ibid.*

"Almost contemporaneous with the establishment of the spoils system in New York was its triumph in Pennsylvania." Fish, *supra*, at 92-94. The first governor under Pennsylvania's 1790 constitution limited appointments to Federalists. *Id.* at 92-93. When Thomas McKean, a Republican, became governor in 1799, he continued the patronage tradition, though Federalists were no longer the beneficiaries. *Id.* at 93. In 1801, he wrote to Thomas Jefferson:

> It appears, that the antirepublicans (even those in office) are as hostile as ever, tho' not so insolent. To overcome them, they must be shaven, for in their offices (like Sampson's locks of hair) their great strength lieth; their disposition for mischief may remain, but the power of doing it will be gone. It is out of the common order of nature to prefer enemies to friends: the despisers of the people should not be their rulers, nor men be vested with authority in a government, which they wish to destroy; a dagger ought not to be put into the hands of an assassin.

Letter from Thomas McKean to Thomas Jefferson (July 21, 1801), *in* 34 *The Papers of Thomas Jefferson* 612, 612 (Barbara B. Oberg ed., 2007). Thus, in the States too, restricting public employment to political partisans was common practice—notwithstanding any First Amendment rights of the government employees.

D. The Emergence of Modern Merit-Based Hiring

While partisan public-employment practices were the norm from the Framing era through the mid-19th century, see, *e.g.*, *Garcetti*, 547 U.S. at 417, the tide shifted in the 1880s with the enactment of the Pendleton Act, ch. 27, 22 Stat. 403 (1883). See *Elrod*, 427 U.S. at 354-355 (plurality opinion). That shift, however, was the result of legislative reform rather than constitutional requirements. As discussed below, it was not until well into the 20th century that the courts suggested that the Constitution might require turning a blind eye to political ideology in government employment. See pp. 17-19, *infra*; see also *Garcetti*, 547 U.S. at 417. Indeed, notwithstanding the increasing popularity of merit-based public employment as a matter of public policy throughout the late 19th and 20th centuries, political patronage never died out entirely. See *Rutan*, 497 U.S. at 94, 96-97 (Scalia, J., dissenting); *Branti*, 445 U.S. at 522 n.1 (Powell, J., dissenting); see also, *e.g.*, Bowman, *supra*, at 57 (discussing Chicago Machine politics); Glasheen, *supra*, at 668 (noting that patronage is still common in some areas).

The point is not that unrestricted patronage might be a good practice. It is not. An apolitical, merits-based civil service is central to the government's functioning and AFGE's tenets. But the prevalence of patronage throughout history weighs strongly in the balance when considering whether to extend more recent constitutional

decisions that were decided in a way that contravenes such Framing-era practices.

E. Historical Practice Weighs Against Overruling *Abood*

Viewed from the originalist perspective, the pervasive and longstanding tradition through much of this Nation's history counsels dispositively against overruling *Abood*. Patronage imposes a severe burden on First Amendment values. Qualified individuals are denied the possibility of public employment, or removed from that employment, by virtue of their political affiliation or beliefs—matters at the core of the First Amendment. By contrast, *Abood* does not restrict any employee from taking any political or ideological view that suits him: "[P]ublic employees are free to participate in the full range of political activities open to other citizens." *Abood*, 431 U.S. at 230. All that *Abood* requires is that public employees pay dues necessary to support the government's legitimate choice to deal with a single, effective representative of its workforce. *Id.* at 224-225.

If this Nation's Founders tolerated patronage in the interest of government efficiency, it is hard to see how it could be improper to require public employees to pay their fair share of the costs of representation that serves their interests. As then-Justice Rehnquist noted in his concurrence in *Abood*, it is impossible "to see a constitutional distinction between a governmentally imposed requirement that a public employee be a Democrat or Republican or else lose his job, and a similar requirement that a public employee contribute to the collective-bargaining expenses of a labor union." *Abood*, 431 U.S. at 243-244. The fair-share fees at issue merely represent one way a government may exercise its "leeway" to structure its workforce and the economic condi-

tions of employment to promote efficiency and effectiveness, notwithstanding countervailing constitutional considerations. See *Engquist* v. *Or. Dep't of Agric.*, 553 U.S. 591, 599 (2008).

It is no answer that "the vast majority of public sector labor laws were enacted in the 1960s and 1970s," while patronage "existed before and after the First Amendment's adoption." Pet. Br. 20 n.8. The Framers' tolerance of the highly intrusive practice of patronage makes the issue of fair-share fees an *a fortiori* case. The question is not whether fair-share fees existed at the Framing. Neither video games nor movies existed at the Framing either. But this Court looked to history in applying the First Amendment to both. See *Brown* v. *Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) ("And whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears."); *Citizens United* v. *FEC*, 558 U.S. 310, 353 (2010) (noting that although "[t]he Framers may not have anticipated modern business and media corporations," the First Amendment extends to such entities); *id.* at 386-393 (Scalia, J., concurring) (discussing the historical approach to corporate speech). The point here is that the historical prevalence of patronage practices for much of this Nation's history speaks volumes about whether this Court should overturn precedent in order to condemn the far less intrusive practice of requiring payment of fair-share fees. See *Rutan*, 497 U.S. at 97 n.2 (Scalia, J., dissenting).

The answer is "no." If historic practice allowed government to condition public employment on political expression—core First Amendment speech—then our

traditions must allow government to condition public employment on payment of fair-share fees, a "tool that many" state and local governments, "in the management of their employees and programs, * * * have thought necessary and appropriate to make collective bargaining work." *Harris* v. *Quinn*, 134 S. Ct. 2618, 2658 (2014) (Kagan, J., dissenting).

II. The Court's More Recent Precedents Do Not Support Overruling *Abood*

This Court's more recent precedents, of course, have departed from the originalist viewpoint of the First Amendment rights of public employees. This Court has thus departed from the notion that "a public employee ha[s] no right to object" to conditions of employment that "restrict[] the exercise of constitutional rights"—and rightly so. *Garcetti*, 547 U.S. at 417 (quotation marks omitted). Consequently, it is no longer the case that a "[policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe* v. *Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892). But the effort to further extend that departure here falls short of justification.

A. This Court's departure from the originalist view first took root in the mid-1970s. For example, in *Elrod*, a plurality of the Court held that "the practice of patronage dismissals" violates the First Amendment. 427 U.S. at 373. At least for certain government positions, the Court recognized, political viewpoint and affiliation lack any plausible connection to the previously cited goal of government effectiveness. See *id.* at 364-368. In *Branti*, the Court re-affirmed the *Elrod* plurality's perspective. It also clarified that the key inquiry separating constitutional from unconstitutional conduct is "whether the hiring authority can demonstrate that party affiliation is

an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. And in *Rutan*, the Court held that patronage practices other than firing—including "promotion, transfer, recall, and hiring decisions involving low-level public employees"—may not "be constitutionally based on party affiliation and support." 497 U.S. at 65.[2]

Those departures from originalism—and the corresponding expansion of First Amendment protections—are now settled law. But such departures from history and tradition must have stopping points, lest they invade other critical governmental interests. As the *Elrod* plurality observed, the "prohibition on encroachment of First Amendment protections" it recognized in the government-employment context "is not an absolute." 427 U.S. at 360 (plurality opinion). The government thus may "restrain[ ]" employee speech for "appropriate reasons," *ibid.*, including where necessary to "maintain[ ] governmental effectiveness and efficiency," *Branti*, 445 U.S. at 517; see also *Elrod*, 427 U.S. at 367-368 (plurality opinion); *Rutan*, 497 U.S. at 64. In the patronage context, this Court ultimately came to the conclusion that, at least for certain employees, there was no governmental efficiency interest that could support the severe intrusion on First Amendment interests that is occasioned when citizens are hired, fired, promoted, or demoted based on

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[2] *Elrod*, *Branti*, and *Rutan* struck down the political patronage practices at issue "[w]ith scarcely a glance at almost 200 years of American political tradition." *Branti*, 445 U.S. at 521 (Powell, J., dissenting); see also *Rutan*, 497 U.S. at 97 n.2 (Scalia, J., dissenting) ("The order of precedence is that a constitutional theory must be wrong if its application contradicts a clear constitutional tradition; not that a clear constitutional tradition must be wrong if it does not conform to the current constitutional theory.").

viewpoints with no relationship to their employment responsibilities.

B. There are, however, no sensible grounds for extending that departure from original principles to this context (especially when it would require overruling a case far more consonant with originalist principles). First, while the government may lack any cognizable interest in dismissing citizens from jobs based on political perspectives unrelated to their jobs or performance, the government has a compelling interest in bargaining and dealing with a union that provides effective and meaningful employee representation. Indeed, an organized and represented workforce is critical to "maintaining governmental effectiveness and efficiency." As *Abood* recognized:

> The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. * * * It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

431 U.S. at 220–221. The fair-share fees at issue are critical to achieving that government objective and avoiding free-riders. By law, "a union *must* seek to further the interests" not only of its dues-paying members, but also "of its nonmembers." *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part). And "where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost." *Ibid.*

Second, this context does not remotely approach the severe intrusion on First Amendment values that might arise when ordinary citizens, in ordinary positions, are punished for political affiliation or beliefs by loss of employment. Without doubt, "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests" (as those interests have more recently been understood). *Abood*, 431 U.S. at 222. But any potential burden on free-speech rights—the possibility that certain "activities undertaken by the union" in collective bargaining may "interfere in some way with an employee's freedom to associate for the advancement of ideas," *ibid.*—is minimal. Government employees remain "free to participate in the full range of political activities open to other citizens." *Id.* at 230. Requiring government employees to pay fair-share fees does not punish some employees for their political views, nor does it reward other employees for their different views.

In view of that trajectory, the arguments for overruling *Abood* are bereft of justification. Far from departing from this Nation's historic and original practices, *Abood* is entirely consistent with them. For at least the first 150 years of this Nation's history, the practice of patronage—which intrudes far more gravely on core First Amendment values—was a matter of routine. Given that it was once permissible to cleanse the employment rolls of perceived political opponents, it is hard to see why our traditions and values should be offended by requiring public employees who are legally entitled to the benefits of representation to pay their fair share of the costs. While this Court has in more recent years put a stop to political patronage in certain contexts, there is no basis for further extending that departure from orig-

inalism. Fair-share fees impose nothing near the burden on government employee speech prohibited in *Elrod*, *Branti*, and *Rutan*—which involved hiring and firing of individuals based on the exercise of core First Amendment activity. And the government interest underlying those fees, unlike the interest in patronage, has grown rather than withered over time. Now, more than ever, government efficiency requires that the government be able to negotiate, deal, and work with an organized and represented workforce. There is, as a result, no justification for banning fair-share fees necessary to that outcome. And there certainly is nothing approaching the "special justification" required "[b]efore overturning a long-settled precedent" like *Abood*. *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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